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In the Supreme Court of the United States

OCTOBER TERM, 1970

HUGH MCINTOSH, PETITIONER

v.

UNITED STATES OF AMERICA

CARMINE PERSICO, JR., SALVATORE ALBANESE AND RALPH SPERO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
SIDNEY M. GLAZER,
MICHAEL G. KELLY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. No. 365, App. 1a–19a) is reported at 425 F. 2d 1375. The opinions of the court of appeals on earlier appeals and in a mandamus proceeding are reported at 305 F. 2d 534, 349 F. 2d 6, and 406 F. 2d 192.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1970, and a petition for rehearing was denied on May 8, 1970. Mr. Justice Harlan extended the time for filing petitions for writs of certiorari to and including July 7, 1970, and on that date the petitions were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of a fair trial by publicity following the appearance of government witness Joseph Valachi, and whether the publicity was attributable to governmental misconduct.

2. Whether testimony by Valachi concerning admissions made by certain petitioners violated the confrontation rights of other petitioners.

3. Whether the trial court properly ruled that a government witness who had testified at earlier trials need not disclose his address or place of employment where the trial court specifically found such information might endanger the personal safety of the witness.

4. Whether, in the circumstances of this case, following two reversals and two mistrials, petitioners properly could be tried a fifth time.

STATEMENT

On May 9, 1968, petitioners were convicted by a jury in the United States District Court for the Eastern District of New York of robbery and conspiring to rob a truck transporting goods in inter-

state commerce, in violation of 18 U.S.C. 1951. Petitioners Persico and McIntosh were sentenced to concurrent terms of fourteen and nine years' imprisonment respectively, with eligibility for parole to be determined by the Board of Parole. Petitioners Albanese and Spero received suspended sentences of ten years' imprisonment. The court of appeals affirmed. (Pet. No. 365, App. 1a–19a).

The procedural and factual background of this case is set forth in the opinion below (Pet. No. 365, App. A) and in the earlier opinions of the court of appeals. (See 305 F. 2d 534; 349 F. 2d 6; and 406 F. 2d 192; see also the government's brief in opposition in No. 1187, O.T. 1968, certiorari denied, 395 U.S. 911.)[1] In essence, the facts show that on July 28, 1959, a truck containing goods belonging to the Akers Motor Lines was hijacked. At the instant trial, as in the four previous trials, the government's principal witness was Casper Vaccaro, who testified that he conspired with the petitioners and others to hijack the truck. Vaccaro said that after he "spotted" the truck at the Akers terminal, he and certain of the petitioners

[1] Petitioners and others were indicted in April 1960. The first trial, held in May 1961, ended in a jury disagreement. The convictions resulting from the second trial, in June 1961, were reversed by the court of appeals due to trial errors. The third trial, held in May 1963, resulted in a mistrial as to petitioners Spero, Albanese, and Persico and in a hung jury as to the other defendants. The fourth trial, which lasted from January to April 1964, resulted in convictions of all of the defendants; these convictions were reversed by the court of appeals in July 1965 because of errors in the charge to the jury. The present trial took place in April and May 1968 (see Pet. No. 365, App. 2a–3a; *infra*, pp. 11–12.)

stopped the truck some distance from the terminal and held the driver, Edward Kennedy, until the other co-conspirators took the contents of the truck. Vaccaro also testified that petitioner Persico planned and directed the operation and that the other petitioners participated in the actual hijacking. (See the summary of Vaccaro's testimony in the first appeal at 305 F. 2d 534, 536.) The defense at the instant trial was an attempt to discredit Vaccaro by the testimony of an employee of Akers who testified that, due to the geographical location of the truck at the Akers yard at the time of the crime, it would have been impossible for Vaccaro to have "spotted" the truck (T. 4028–4045).

ARGUMENT

I. At the instant trial, the government for the first time used Joseph Valachi as a witness. Valachi, a federal prisoner, had previously achieved notoriety as a result of his testimony before a Senate committee in 1963 and elsewhere concerning organized crime. After the government announced that it would call Valachi as a witness, publicity concerning him and petitioners appeared in newspapers and other news media. The jurors were exposed to this publicity in varying degrees (see Pet. No. 365, App. 5a–8a). Petitioners contend that this publicity was the product of governmental misconduct in the "surprise" production of this witness after the trial had commenced

"T" refers to the transcript of the present trial; "ET" refers to proceedings in the fourth trial occurring on January 6, 1964; "ST" refers to post trial transcripts of September 1968; and "JT" refers to a post trial transcript of June 1969.

and that the impact of the publicity on the jury was not dispelled by the safeguards employed by the trial judge.

Valachi's name first entered the case at the fourth trial when the defense sought a continuance on the basis of testimony concerning organized crime given by Valachi before a Senate Committee. According to defense counsel, Valachi had testified (ET 21–23, 59) that petitioner Persico had told him at a detention center that "he had gotten $1,500 for his end of this very alleged hijacking, which is the subject of this indictment * * *."[3] In preparing for the fifth trial newly assigned government counsel, apparently prompted by this disclosure (see Pet. No. 365, App. 23a), confirmed the fact that Valachi had testimony to give regarding some of the petitioners (T. 2111, 2116–2118, 2122–2129).

On April 4, 1968, shortly after the instant trial commenced, the government sought and the trial judge granted a writ of habeas corpus ad testificandum for the production of Valachi (ST 3–8, 11–12). Valachi's life had been threatened in prison and the moving papers were sealed in view of the government's responsibility for Valachi's safety (T. 3561–3564; JH 13–18). Later, during trial, government counsel advised the defense out of the hearing of the jury that Valachi would be the next witness (T. 2094, 2111). When the defense objected to his appearance, the court required an offer of proof which informed defense counsel about the nature of the testimony ex-

[3] As a matter of fact, Valachi had not so testified (T. 2926, 2971–2972, 2998–2999).

pected from Valachi (T. 2097–2103, 2185, 2191–2193). That evening and the next morning the news media reported that Valachi was going to be a witness. As the opinion below details (Pet. No. 365, App. 5a–7a), the publicity, taken "at its worst," recited Valachi's criminal background and indicated that petitioners were connected to organized crime; that petitioner Persico was a "Cosa Nostra figure" (nicknamed the "Snake") and was a graduate of the "Profaci mob"; that Valachi, a "Cosa Nostra figure", had testified before a Senate rackets committee; that the case had been tried four times before; that a special prosecutor from the Department of Justice was trying the case; that the government was concerned for Valachi's safety; and that the admissions about which Valachi was to testify had been made to him while the petitioners were in prison.

The trial court closely examined each juror separately and each—except one who was later excused—assured the court that he could decide the case fairly based on the evidence introduced in the case (T. 2296–2407).[1] As the opinion below further details (Pet. No. 365, App. 9a), the judge further explicitly instructed each juror that the news mention of "Cosa Nostra" was a "smear" which was wholly irrelevant to the case and which petitioners could not and did not have to defend against; that the case was about one thing only: whether the petitioners or some of them obstructed by robbery goods in interstate commerce or conspired to do so, and nothing else. The court held the

[1] An illustration of such individualized *voir dire* is set out in the opinion below (see Pet. No. 365, App. 9a–11a, note 8).

ultimate disposition of the petitioners' motions for a mistrial in abeyance until after Valachi's testimony (T. 2423) and thereafter denied the motions (T. 3593–3607).

As this Court has recognized, resolution of the difficult problem of the impact of extra-judicial publicity upon a jury necessarily involves the exercise of a "large discretion" in the trial judge, and, in the last analysis, "each case must turn on its special facts." *Marshall* v. *United States*, 360 U.S. 310, 312; *Holt* v. *United States*, 218 U.S. 245, 251. This is, of course, not to say that the trial court's decision is final; clearly, however, it should be given substantial weight. In *Marshall*, the Court found that the court's discretion had been abused because the jury had been exposed to information previously characterized by the government as tending to refute the defense of entrapment and which the trial judge had ruled was so prejudicial that it could not be offered as evidence.

This case stands in a different posture. The publicity here, unlike that in *Marshall*, did not relate to the issue of guilt or innocence (Pet. No. 365, App. 8a). As the court below noted, most of the material contained in the publicity was brought out at trial "as competent evidence" *Ibid.*; see also Pet. No. 365, App. 10a. Here the trial judge made every conceivable effort to insure that petitioners were tried by a fair jury, and it was his judgment that the effect of the publicity would not, under all the circumstances, be unduly

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Save for the references to the "Cosa Nostra" and organized crime, which, as the court of appeals further pointed out, were "effectively" dealt with by the trial court (see Pet. No. 365, App. 9a).

prejudicial. He was in the best position to judge the matter and the circumstances reveal no reason why his judgment should be overturned. Nothing in *Sheppard* v. *Maxwell*, 384 U.S. 333, is to the contrary. In that case, there was a "carnival atmosphere at trial" which could have been avoided. Here, there is absolutely no suggestion that such an atmosphere existed.

Nor was the government guilty of misconduct because it called Valachi as a witness in the middle of the trial without prior notice to defense counsel. The background of this case was such that the government properly deemed secrecy essential to Valachi's safety. Following the second trial, a co-defendant had been shot to death and petitioner Persico himself had been shot and wounded during the third trial. In addition, Valachi's life had been threatened while he was in prison.[*]

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[*] The claim that reporters were aware of Valachi's presence before the government told defense counsel is, as the opinion below noted (Pet. No. 365, App. 5a, note 5), most "tenuous" (T. 2209-2210). With "a plenitude of reporters" present (T. 2209) the defense pressed for more than two hours in open court for most of the material used by the press (T. 2091-2213) and later testified to by Valachi.

The further claim that the government practiced deception on the trial judge in implying that the then United States Attorney had authorized the "secret summoning" of Valachi (Pet. No. 368, pp. 14, 18, 32) is far-fetched. The body of the affidavit made no such representation but indicated quite the contrary (S.T. 186); petitioners seek to sustain this argument on the sole, flimsy ground that the United States Attorney's typewritten initials appeared in the upper corner of the affidavit.

To be sure, with the benefit of hindsight, it might have been better practice had the jury been sequestered after Valachi was called. Neither government nor defense counsel, however, made any such suggestion along this line. In this ongoing trial, where decisions had to be made quickly, the failure to sequester hardly warrants a conclusion of governmental misconduct.

2. The claim that the admissions to which Valachi testified violated the rule of *Bruton* v. *United States*, 391 U.S. 123, is adequately answered in the opinion below (Pet. No. 365, App. 12a–14a). Valachi did not testify, as petitioners contend, that Albanese said he and his friends including Persico went out on hijackings together (see Pet. No. 365 at p. 17). Rather, he testified that Albanese said Persico was his friend and that "Chink" Vaccaro went with him on hijackings (T. 2781, 2786). Valachi further testified to a conversation with Persico in which the latter admitted paying money to Joe Profaci as "taxes" in the Akers hijacking and in which Persico admonished petitioners Albanese and McIntosh to listen to Valachi in the future and to seek his advice (T. 2792–2793). This testimony did not accuse the latter two petitioners of participation in the crime charged. Moreover, unlike *Bruton*, the statements here were not incriminatory admissions made to a third party outside the presence of the parties at trial without the right of confrontation; they were made in the presence of Albanese and McIntosh, and Valachi could be fully cross-examined as to how they acted. However that may be, the trial

court instructed the jury that complicity could not be inferred from their silence. In these circumstances, there is no reason to conclude that the jury could not have followed those instructions.[1]

3. Petitioners assert that the court's refusal to require the government witness, Vaccaro, to disclose his addresses and places of employment since his release from prison was error. In *Smith* v. *Illinois*, 390 U.S. 129, there had been no showing of any reason for excusing the witness from disclosing his name and address (see concurring opinion of Mr. Justice White, 390 U.S. at 133–134). Here, on the other hand, the court determined that Vaccaro's apprehension of danger was reasonable based on the history of violent events connected with the trial (Pet. No. 368, App. 16a). Considering further that Vaccaro had previously testified, been subject to cross-examination and was well known to the petitioners, the district court was justified in concluding that his address was not necessary to effective cross-examination. Cf. *United States* v.

[1] Contrary to petitioners' contention (Pet. No. 365, p. 15), jurors are not "powerless" to obey instructions to disregard prejudicial matters. Cf. *Frazier* v. *Cupp*, 394 U.S. 731, 735–736. Jurors are frequently admonished to consider prior convictions of a criminal defendant for the purpose of impeachment only and defendants whose criminal records are known to jurors are frequently acquitted. The strong admonition to the jury, including the court's statement that the references to organized crime in the publicity was a "smear" which the petitioners did not have to defend against, should have had an effect on conscientious jurors.

Lee, 413 F. 2d 910, 915 (C.A. 7), certiorari denied, 396 U.S. 1022; *United States* v. *Lawler*, 413 F. 2d 622, 627 (C.A. 7), certiorari denied, 396 U.S. 1046.

4. Petitioners complain that their final trial on these charges amounts to unconscionable government "oppresiveness." Petitioners' complaints about their repeated trials have previously been considered on a number of occasions, and we submit that it has been properly concluded that they have not been treated unfairly or subjected to undue prejudice.

In October 1967 (after reversal of the conviction resulting from the fourth trial), a motion was made to dismiss the indictment on the grounds that petitioners were denied the right to a speedy trial and

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[8] As earlier noted, the first trial of this case in May 1961 ended in a hung jury. A second trial the following month resulted in a conviction of all the petitioners and two other alleged co-conspirators La Fante and Magnasco. Magnasco was shot to death prior to sentencing. On appeal, the convictions were reversed in 1962 because of errors by the prosecutor and the trial judge. *United States* v. *Persico*, 305 F. 2d 534 (C.A. 2). The third trial, held in May 1963, ended in a mistrial as to Persico, Albanese and Spero when Persico was shot at and wounded. Petitioners McIntosh and defendant La Fante continued the trial, which ended in a hung jury. The fourth trial, which commenced in January 1964, resulted in a verdict of guilty in April 1964, but in July 1965 the court of appeals reversed and remanded for a new trial because of error in the charge to the jury. *United States* v. *Persico*, 349 F. 2d 6 (C.A. 2).

that they would be subjected to double jeopardy and denied due process by further retrial. After a hearing, Judge Weinstein entered an order on December 13, 1967, denying the motions. He determined that six months of the delay since the case was remanded for a new trial was chargeable to the government, and that the responsibility for the remainder of the delay was not clearly assessable (Pet. No. 368, App. H). The retrial commenced in April 1968 before Judge Dooling, who likewise denied the renewal motions to dismiss made before the retrial commenced and at the close of the case before the charge to the jury (Tr. 199, 4195). However, after the verdict came in, Judge Dooling distributed a proposed memorandum and order dismissing the indictment (Pet. No. 368, App. F, A44–A59). On December 2, 1968, before any final order was entered, the government filed a petition for a writ of mandamus in the court of appeals. On January 21, 1969, the court of appeals issued the writ and directed Judge Dooling to enter judgments of conviction on the jury's verdict and to sentence the defendants, 406 F. 2d 192, and this Court denied certiorari, 395 U.S. 911.[2]

[2] There is no substance to petitioners' argument (Pet. No. 368, pp. 35–37) that Judge Dooling's *proposed* order of dismissal was the equivalent of a postverdict directed verdict of acquittal and thus amounted to a disposition of the case unreviewable under *United States* v. *Sisson*, 399 U.S. 267. The short answer is that Judge Dooling did not in fact enter any order; thus there is no occasion to consider whether an appeal would have been available if he had. Moreover, the proposed order would not have relied upon the insufficiency of the evidence; but rather on other factors.

In *Harrison* v. *United States*, 392 U.S. 219, 221, note 4, this Court recently rejected a claim of a denial of a speedy trial when the petitioner had been indicted more than eight years earlier and had been tried and convicted three times. It reversed the judgment of conviction and remanded the case for a fourth trial. Thereafter, petitioner was again convicted and sentenced to life imprisonment and his conviction was affirmed on appeal. 419 F. 2d 691 (C.A.D.C.), certiorari denied, 394 U.S. 990. The fact that petitioners here bottom their claim on "cruelty and oppressiveness" rather than on speedy trial considerations does not serve to distinguish this case from *Harrison*. As the court below noted: "[I]t appears from the record that the defendants acquiesced in the repeated postponements", that "[t]here is no indication of 'purposeful or oppressive' delay on the part of the government", and that "the specific circumstances advanced by appellants as constituting prejudice resulting from delay are not impressive" (Pet. No. 368, App. A18–A19). See also *United States* v. *Ewell*, 383 U.S. 116, 120, 122.[10]

[10] The claim as to the sufficiency of the evidence in No. 368—raised for the first time in the petition for rehearing *en banc*—does not raise such exceptional considerations as to warrant review by this Court at this juncture. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2.

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

SIDNEY M. GLAZER,
MICHAEL G. KELLY,
Attorneys.

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